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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL PAULICK,

No. C 08-04860 CW

Plaintiff,

ORDER DENYING  
DEFENDANTS' MOTION  
TO DISMISS

v.

BAVARIAN LION VINEYARD DEVELOPMENT,  
LLC, et al.,

Defendants.

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Defendants move to dismiss Plaintiff's state law claims, arguing that the Court should exercise its discretion not to take supplemental jurisdiction over them. Plaintiff opposes the motion. Having considered all of the papers filed by the parties, the Court DENIES Defendants' motion.

BACKGROUND

According to the complaint, Plaintiff Paulick is a "person with a disability" or "physically handicapped person," as defined by all applicable statutes. Plaintiff is mobility impaired, requires the use of mobility assistive devices, and is unable to use portions of public facilities which are not accessible to physically disabled persons who are mobility impaired. Defendants

1 are the owners and operators of the "Resort at Squaw Creek,"  
2 located at 400 Squaw Creek Road, Olympic Valley, California.

3 This case involves claims for relief based on alleged  
4 violations of the Americans with Disabilities Act of 1990 (ADA) and  
5 three provisions of California state law: California Civil Code  
6 § 54 (California Disabled Persons Act), California Civil Code § 51  
7 (Unruh Act), and California Health and Safety Code § 19955(a).

8 DISCUSSION

9 I. Timeliness of Motions

10 Plaintiff argues that the Court should deny Defendants' motion  
11 to dismiss because their answer was filed late. However, it is  
12 contrary to the spirit of the Federal Rules of Civil Procedure to  
13 avoid a decision on the merits on the basis of mere technicalities.  
14 Foman v. Davis, 371 U.S. 178, 181 (1962). The Court will consider  
15 Defendants' motion to dismiss.

16 II. Original Jurisdiction

17 Plaintiff argues that the Court has original jurisdiction over  
18 his state law claims because violation of federal law is an element  
19 of two of the three state law claims plead, and that if the Court  
20 has original jurisdiction over his state law claims, the motion to  
21 dismiss for lack of supplemental jurisdiction is moot.

22 Pursuant to 28 U.S.C. § 1331, federal courts "have original  
23 jurisdiction [over] all civil actions arising under the  
24 Constitution, laws, or treaties of the United States." A case may  
25 arise under federal law where "it appears that some substantial,  
26 disputed question of federal law is a necessary element of one of  
27 the well-pleaded state claims." Franchise Tax Bd. of Cal. v.  
28 Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 13 (1983).

1 Nonetheless, the "mere presence of a federal issue in a state cause  
2 of action does not automatically confer federal-question  
3 jurisdiction." Merrell Dow Pharmaceuticals Inc. v. Thomas, 478  
4 U.S. 804, 813 (1986). Rather, courts should approach the issue of  
5 federal question jurisdiction as one requiring "sensitive judgments  
6 about congressional intent, judicial power, and the federal  
7 question." Id. at 810. Thus, courts look both to congressional  
8 intent and the nature of the federal interest at stake when  
9 determining the propriety of federal question jurisdiction. Id.

10 The Ninth Circuit's decision in Wander v. Kaus, 304 F.3d 856  
11 (9th Cir. 2002), is controlling on this point. In Wander, the  
12 plaintiff alleged that the defendants discriminated against  
13 disabled persons in violation of the ADA and the California  
14 Disabled Persons Act because of certain structural barriers at the  
15 defendants' store. Id. at 857. The plaintiff's ADA claim became  
16 moot when the owners transferred their ownership interest, leaving  
17 only the plaintiff's state law claims. Id. After reviewing the  
18 legislative history, the Ninth Circuit held that "the presence of a  
19 claimed violation of the [ADA] as an element of a state cause of  
20 action is insufficiently substantial to confer federal question  
21 jurisdiction." Id. (citing Merrell Dow, 478 U.S. at 813). Based  
22 on this finding, the Ninth Circuit affirmed the district court's  
23 finding that it did not have federal question jurisdiction and its  
24 discretionary decision not to exercise supplemental jurisdiction,  
25 dismissing the remaining state law claims. Id.

26 Here, Plaintiff's state law claims under California's Unruh  
27 Act and the Disabled Persons Act each incorporate federal ADA law,  
28 in that a violation of the ADA constitutes a violation of

1 California's Unruh Act and Disabled Persons Act. See Cal. Civ.  
2 Code § 51(f) ("A violation of the right of any individual under the  
3 [ADA] shall also constitute a violation of this section"); id.  
4 § 54(c) ("A violation of the right of an individual under the [ADA]  
5 also constitutes a violation of this section"). However, under  
6 Wander, the fact that a violation of the ADA is an element of a  
7 state cause of action is not sufficient to confer federal question  
8 jurisdiction.

9 Accordingly, the Court does not have original jurisdiction  
10 over Plaintiff's state law claims.

11 III. Supplemental Jurisdiction

12 Defendants argue that the Court should decline to exercise  
13 supplemental jurisdiction over Plaintiff's state law claims because  
14 of inconsistency between state and federal courts as to whether a  
15 plaintiff must prove intentional discrimination to collect damages  
16 under the Unruh Act.

17 Where a federal court has original jurisdiction over a claim,  
18 the court may exercise supplemental jurisdiction over state law  
19 claims that are transactionally related to the federal claim. See  
20 28 U.S.C. § 1337. Section 1337(a) provides in pertinent part:

21 in any civil action of which the district  
22 courts have original jurisdiction, the district  
23 courts shall have supplemental jurisdiction  
24 over all other claims that are so related to  
claims in the action within such original  
jurisdiction that they form part of the same  
case or controversy under Article III of the  
United States Constitution.

25 In United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966), the  
26 Supreme Court found that as long as (1) the federal claim providing  
27 original jurisdiction has "substance sufficient to confer subject  
28

1 matter jurisdiction on the court," (2) the state and federal claims  
2 "derive from a common nucleus of operative facts," and (3) the  
3 plaintiff's claims "are such that he would ordinarily be expected  
4 to try them all in one judicial proceeding," a federal court may  
5 legitimately exercise supplemental jurisdiction.

6 However, where "novel or complex" issues of state law exist,  
7 where the state law claims "substantially predominate" over the  
8 federal law claims, where the district court has dismissed the  
9 claims on which it based its original jurisdiction, or in other  
10 "exceptional circumstances," the court may decline to exercise  
11 supplemental jurisdiction. 28 U.S.C. § 1337(c). Additionally,  
12 "economy, convenience, fairness and comity" should be considered in  
13 an analysis of supplemental jurisdiction. Executive Software v.  
14 United States District Court, 24 F.3d 1545, 1556-57 (9th Cir.  
15 1994).

16 In 1991, the California Supreme Court held that the Unruh Act  
17 requires proof of intentional discrimination before a plaintiff may  
18 recover damages. Harris v. Capital Growth Investors XIV, 52 Cal.  
19 3d 1142, 1175 (1991). Subsequently, however, the Ninth Circuit,  
20 found that amendments to the Unruh Act in 1992 superseded the  
21 California Supreme Court's holding in Harris in some cases.  
22 Lentini v. Cal. Center for the Arts, 370 F.3d 837, 847 (9th Cir.  
23 2004). The Lentini court held that "regardless of whether Harris  
24 may continue to have relevance to other Unruh Act suits, no showing  
25 of intentional discrimination is required where the Unruh Act  
26 violation is premised on an ADA violation." Id. The court in  
27 Lentini reached this conclusion because the 1992 Unruh Act  
28 amendment provided that "a violation of the right of any individual

1 under the [ADA] of 1990. . . shall also constitute a violation of  
2 [the Unruh Act]," and because it was "undisputed that a plaintiff  
3 need not show intentional discrimination in order to make out a  
4 violation of the ADA." Thereafter, in Gunther v. Lin, 144 Cal.  
5 App. 4th 223, 340 (2007), the California Court of Appeal held that  
6 the Ninth Circuit's holding in Lentini was not an accurate  
7 statement of California law.

8 Faced with this conflicting authority, the Ninth Circuit in a  
9 later case certified to the California Supreme Court the question  
10 of whether a plaintiff claiming the denial of equal treatment on  
11 the basis of disability in violation of the Unruh Act, based on an  
12 ADA violation, must prove intentional discrimination to obtain  
13 damages. Munson v. Del Taco, Inc., 522 F.3d 997 (9th Cir. 2008),  
14 petition for certification filed (April 14, 2008) (No. 06-56208),  
15 certification granted, 522 F.3d 997 (June 25, 2008).<sup>1</sup>

16 The Court recognizes that other district courts in California  
17 faced with this issue have declined to exercise supplemental  
18 jurisdiction in cases involving state law claims under the Unruh  
19 Act. See Yates v. Union Square, 2008 WL 346418 (N.D. Cal. February  
20 7); Wilson v. PFS, LLC, 493 F. Supp. 2d 1122, 1126 (S.D. Cal.  
21 2007); Oliver v. GMRI, Inc., 2007 WL 4144995 (S.D. Cal.); Morgan v.  
22 American Stores Co., 2007 WL 1971945 (S.D. Cal.); Pinnock v. Java  
23 Depot, Inc., 2007 WL 2462106 (S.D. Cal.); Pinnock v. Safino  
24 Designs, Inc., 2007 WL 2462107 (S.D. Cal.); Cross v. Pac. Coast  
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26 <sup>1</sup>Defendants' request for judicial notice of the procedural  
27 history of this case is denied as unnecessary, as is Defendants'  
request to take judicial notice of published cases or cases  
available through online legal research services.  
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<sup>1</sup> Plaza Invs, L.P., 2007 WL 951772 (S.D. Cal.).

2 However, it remains within this Court's discretion to accept  
3 supplemental jurisdiction despite the disagreement between  
4 California and federal courts. The conflict will be resolved by  
5 the California Supreme Court in Munson and, irrespective of whether  
6 Plaintiff's Unruh Act claim is in state or federal court, it will  
7 be governed by the California Supreme Court's decision. Because  
8 the federal and state claims here derive from a common nucleus of  
9 operative facts, it is in the interest of "economy, convenience,  
10 fairness and comity" for Plaintiff's state and federal claims to  
11 remain in federal court. Accordingly, the Court will exercise  
12 supplemental jurisdiction under § 1333(c)(3) over Plaintiff's state  
13 law claims.

## CONCLUSION

15 The Court DENIES Defendants' motion and exercises supplemental  
16 jurisdiction over Plaintiff's state law claims.

19 IT IS SO ORDERED.

21 | Dated: 3/10/09

Claudia Wilken

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CLAUDIA WILKEN  
United States District Judge